IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 376

DUNBAR-STANLEY STUDIOS, INC.,
a CORPORATION,
APPELLANT,

versus

STATE OF ALABAMA,
APPELLEE.

ON APPEAL FROM THE
SUPREME COURT OF ALABAMA
3 DIV. 278

MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM

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Appellee, pursuant to Rule 16 of the Revised Rules of this court, moves that the final judgment and decree of the Supreme Court of Alabama in this cause be affirmed on the ground that the questions which are presented in the "Jurisdictional Statement" of the Appellant are of such an unsubstantial nature that they do not warrant any further review or judicial determination.

Motion is made to dismiss and affirm also on the ground that the alleged questions posed by the Appellant on this appeal relate mainly to the characterization and the process of defining the authoritative meaning of the state taxing statute involved,

which process this court has held on several occasions to be within the exclusive jurisdiction and the prerogative of the state courts. See State of Alabama v. King & Boozer, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46; United Gas Pipeline Company v. Ideal Cement Company, 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677; Olan Mills, Inc., of Tennessee v. City of Opelika, et al, 207 F. Supp. 332, at page 335, among others.

I

OPINIONS BELOW.

A copy of the opinion in this case set forth in its entirety will be found on page 25 of the Appellant's Jurisdictional Statement Appendix, Exhibit A, and reference is herein made thereto. It has not as yet been officially reported, but unofficially, and in the Advance Sheet to the Southern Reporter, it is reported as 210 So. (2d) 696.

The opinion of the Supreme Court of Alabama in this case is based and predicated on two former decisions of the Alabama Court which involved facts substantially the same as here, and wherein the issues involved were the same. See Graves v. State, 258 Ala. 539, 62 So. (2d) 446 (1953), and Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So. (2d) 388 (1961), and also see Olan Mills, Inc. of Tennessee v. City of Opelika, et al, 207 F. Supp. 332 (1962).

The observation made by the Supreme Court of Alabama in Haden v. Olan Mills, Inc., supra, 135 So. (2d) at page 390 is typical of the holdings of that court in this case, as well as in the Graves and in the City of Opelika cases, and is as follows:

> "As we have shown above, we feel that the conduct of the photographer in this state is a separate and distinct incidence upon which the tax falls."

II

JURISDICTION

We have no quarrel with the Appellant with reference to the statements made by it under paragraphs numbered 1, 2 and 3 under the topic, "Jurisdiction," as is contained on page 2 of the Appellant's Jurisdictional Statement. However, we strongly disagree with the Appellant with what he states under paragraph 4, pages 2 and 3 of its brief, and under the same topic. We also cannot agree that any of the cases which have been cited by the Appellant on page 3 of its brief and under the same topic are at all applicable to the facts and circumstances of this case. This particularly applies to Nippert v. Richmond, 327 U.S. 416, West Point Grocery Company v. Opelika, 354 U.S. 390, and Olan Mills, Inc. v. City of Tallahassee (Fla.), 100 So. (2d) 164, cert. den. 359 U.S. 924, and the other state cases which are both discussed and distinguished in Haden v. Olan Mills, Inc. 273 Ala. 129, 135 So.(2d) 388, at pages 389 and 390, and which were distinguished and held not to be applicable to the Alabama statute or to the situation in this state in Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at pages 449 and 450.

The cases cited in support of jurisdiction by the Appellant on page 3 of its brief are all cases wherein the statutes involved were said to be directed either at "solicitations" or at sales made in interstate commerce, or where there was a discrimination made against drummers or other salesmen who went from state to state and operated in interstate commerce.

In this case we have no question of "solicitations" or "interstate sales."

". . . this Court is confronted at the outset with the fact that the Supreme Court of the State of Alabama has already, on two separate occasions, construed the tax

ordinances involved and defined the nature of the tax levied thereby. Graves v. State, 258 Ala. 359, 62 So.(2d) 446, and Haden v. Olan Mills, Inc., (Ala. 1961), 135 So.(2d) 388. In each instance, the Alabama Supreme Court construed § 569 of the State statute to be a tax levied upon and directed at the purely local activities of the photographer or other representatives of the company taking and processing the pictures in Alabama."

(Emphasis Supplied)

Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al (U.S. D.C., M.D., Ala., E.D.), 207 F. Supp. 332, at pages 334 and 335.

III

QUESTIONS PRESENTED

The Appellant's topic designated as "Questions Presented," on page 4 of its Jurisdictional Statement, fails to present a clear-cut statement as to what the question on this appeal might be. It is for the most part argumentative and contains impertinent statements which are not revelant to this case or the actual issues involved. Particularly is this applicable to the Appellant's refetence to the case of Dunbar-Stanley Studios, Inc. v. City of Mobile, now No. 377, October Term 1968. That case is entirely a separate and distinct action which has nothing whatsoever to do with this case. That case was decided in the courts below on an entirely different issue than that involved in this case. Moreover, the License Tax Ordinance of the City of Mobile, Alabama, involved in that case is not in any respect the same as the State and County License Tax statute here involved. To attempt to inject the City of Mobile case, No. 377, into this case only serves to confuse and to muddy the waters.

The license tax statute here involved is one of the State and County Business, Occupational and Professional License

Taxes levied under Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958. Such statutes are not in any respect regulatory or police laws. They are merely taxes levied on anyone who engages in any of the businesses, occupations or professions which are designated in such statutes, regardless of whether they come from within or without this state. They are not in any respect permits or entrance fees, but are merely taxes levied on the privilege of engaging in such businesses, and when such businesses are engaged in in this state.

The particular license tax statute, namely, Title 51, Section 569, prior to amendment in 1967, Code of Alabama 1940, Recompiled 1958, is levied on "photographers and photograph galleries." The statute in its entirety is set forth on page 4 of the Appellant's Jurisdictional Statement, so we will not reiterate here. The first part of the statute relates solely to photograph galleries and photographers having a fixed place of business in the county involved, and a separate license tax is levied when Title 51, Section 831, as amended, supra, is read with Section 569, supra, on each such place of business in the county and in the state.

The last part of the statute or the last sentence thereof, levies the separate and distinct license tax on "transient and traveling photographers," which is actually a separate and distinct levy from the first part or tax levied on photographers having fixed places of business in this state. Section 569 of Title 51, supra, then provides insofar as is revelant or pertinent to this case, as follows:

> "For each transient or traveling photographer, five dollars a week."

The license tax then is levied on all transient or traveling photographers in this state, regardless of from where they come, whether they come from within the state or from without

the state, where they go from county to county in this state taking pictures or exposures with their cameras for profit. This license tax has been so administered and applied by the State Department of Revenue over the years. There is no evidence whatsoever in this case that out-of-state traveling photographers who go from county to county in this state taking pictures with their cameras have ever been discriminated against or have been treated any differently for the purpose of this license tax than traveling photographers who reside in this state and who go from county to county in this state taking pictures for profit. The statute applies to all transient photographers equally and alike regardless of from where they come from, whether within the state or without. Moreover, the burden of proof in this respect was on the Appellant in the lower courts, and the Appellant introduced no evidence in this case showing that there was any discrimination in the application and administration of this license tax by those charged in this state with its enforcement.

The Appellee, of course, contends that there is no substantial question involved in this case which would warrant an appeal to this court. However, if the Appellee is wrong in this, then we believe that the question can be best stated as to whether or not under the Commerce Clause of the Federal Constitution the license tax levied in this state on "transient or traveling photographers" under the provisions of Title 51, Section 569, prior to amendment in 1967, Code of Alabama 1940, Recompiled 1958, can be validly levied on such photographers, particularly where the basis of such levy is the assumption that the incidence of the tax, or thing at which the tax is directed, is the activities of such photographers taking place solely in Alabama, namely, those involved in conducting the sittings and taking of the pictures or exposures, when some of the activities involved (said not to be the thing taxed or at which the tax is directed) do take place in interstate commerce.

The question stated in another way might be said to be whether the local activities of the photographers in taking and processing the pictures or exposures in Alabama, can, for the purpose of the incidence of the state license tax on "traveling or transient photographers" under Title 51, Section 569, supra, be validly and realistically separated from the Appellant's other activities, some of which take place in interstate commerce and the license tax directed at such purely local activities, without violating the provisions of the commerce clause.

"The distinction between such a situation and that of drummers soliciting and procuring sales to be consummated by interstate shipments has been narrowly drawn in express terms, as we have shown . . .

"The license here is not laid on the solicitation of the orders."

(Emphasis Supplied)

Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at page 447 (1952).

"The opinion in the Graves case shows that liability for the license was not based on any act of the solicitors used by Olan Mills, Inc., in obtaining the customers, but was based on the conduct of its photographer who moved about in this state from place to place pursuing his profession . . ."

(Emphasis Supplied)

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388, at page 389 (1961).

"As we have shown above, we feel that the conduct of the photographer in this state is a separate and distinct incidence upon which the license tax falls."

Haden v. Olan Mills, Inc., supra, 135 So.(2d) at page 390.

This court on several occasions has held that the authoritative meaning of a state statute is a matter alone for the state courts to decide.

"Who in a particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority."

Alabama v. King & Boozer, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46.

"The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the state, which alone, of course, can define its authoritative meaning."

United Gas Pipe Line Company v. Ideal Cement Company, 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677.

IV

STATEMENT OF THE CASE

The Appellant's "Statement of the Case," is in several instances argumentative rather than an actual statement of the facts.

Appellant states on the one hand in this respect, and actually at the very beginning of his "Statement of the Case," that Appellant's transient photographers have operated and done business in this state, using J. C. Penney Company stores as their bases or places of operation, in cities located in some 8 different counties[*1] in this state, since 1963 without being

[*1] The state and county license tax under Section 569 is levied and applied in each county in this state in which a transient photographer operates regardless of whether he comes from within or without the state. One county license is sufficient for him to operate throughout the entire county. The number of cities or towns in this state that the transient photographer operates in is entirely immaterial, and has nothing whatsoever to do with either the levy or the measure of the tax. It is for the operation of the transient photographer in the county that the tax is levied, and the tax is so applied.

detected by agents of the state until the assessments were made against it in this case in 1966 (thus, implying that the state had waived its right to now collect the license tax from the Appellant), and on the other hand the Appellant argues that this license tax is an entrance fee and that it cannot enter the state until it has first paid the tax. The facts are that the Appellant's transient photographers have been operating freely and without any restraint insofar as the State of Alabama is concerned since 1963 and Appellant has never paid the tax levied under Section 569, supra, although the state contends in this respect that the Appellant's photographers have operated in some 19 counties in this state.

Again we reiterate that the state and county license tax on "traveling or transient photographers" levied under Section 569 is a part of the license taxes which are levied on businesses, occupations, and professions generally, under Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, and have repeatedly been held by the courts of this state to be privilege or occupational taxes for the privilege of engaging in such businesses in this state. Jordan Undertaking Company v. State of Alabama, 235 Ala. 516, 180 So. 99; Pure Oil Co. v. State, 244 Ala. 258, 12 So.(2d) 861, 148 A.L.R. 260; and Casmus v. Lee, 236 Ala. 396, 183 So. 185, 118 A.L.R. 182. Such taxes are in no respect police or regulatory laws. The statutes involved do not set up or provide any conditions for a person who comes from without the state to comply with, which are not also required of residents or persons within the state. It is absurd to say that they are entrance fees. The Alabama Court has held to the contrary. Sunflower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510 at page 511; United Gas Pipeline Company v. Ideal Cement Company, et al, 277 Ala. 612, 173 So.(2d) 777, at page 778.

It is also well to note in this respect that under Title 51, Sections 450 and 831, as amended, Code of Alabama 1940,

Recompiled 1958, which relate specifically to said business and occupational license taxes, that it was not necessary that the state agents catch the Appellant before this license tax statute becomes operative or the tax becomes due. These statutes made it the duty of the taxpayer itself to timely report and pay the tax. See Griffin, et al v. Edwards, Commissioner of Revenue, 260 Ala. 12, 68 So.(2d) 705, at pages 708 and 709.

The Appellant's reference in its "Statement of the Case" page 5 of its Jurisdictional Statement, to the License Tax Ordinance of the City of Mobile (see Case No. 377, October Term 1968), and the situation concerning the levy of that license tax is highly prejudical and irrelevant and is obviously injected into this case (No. 376, October Term 1968) solely for the purpose of confusing the issues. The City of Mobile Ordinance, and the amount of the levy thereunder has nothing whatsoever to do with this case or the issues involved. The situation in this case and the license tax statute involved is entirely different from the ordinance and situation in the case (No. 377) involving the City of Mobile. The Appellant's reference made on page 5 of its "Jurisdictional Statement" to the two cases being "related," is incorrect.

Upon motion made by the Appellant in the Supreme Court of Alabama, that court refused to even set the two cases down for oral argument on the same day, on the grounds that they were two separate and distinct cases, the one having nothing whatsoever to do with the other.

Rather than to accept the Appellant's version of what the facts might be, we believe that they can best be stated from the record and from the findings of the Alabama Supreme Court (see Appendix, Exhibit A, pages 26 and 27, of Appellant's "Jurisdictional Statement"), as follows:

"Appellant, as we view the pleading and testimony, was (1) a non-resident corporation with its principal place of

business in Charlotte, North Carolina, and was so located during the period for which the assessment was made. It sent a photographer, in its employment, to Alabama, to perform the skilled service of taking children's photographs. The exposed film was sent to the North Carolina studio to be developed and converted into finished photographs, which were sent back to Alabama for delivery to appellant's customers. No photographer engaged in the service was a resident of Alabama.

"It seems that the services relative to certain features of the operation were performed through a contractual arrangement with the parent office of J. C. Penney Company which operates stores in several counties in Alabama. The photographer, under the direction of appellant, visited several of the Penney stores in Alabama during the taxable period here under consideration and performed the photographic service, that is, exposing the films for the purpose of making pictures of the subject children.

"It further appears that the Penney stores caused certain advertising to be done which resulted in the recruitment of customers for the proposed photographic service. Penney also took the orders which were transmitted to appellant in Charlotte for acceptance. When the orders were accepted, the finished product was sent to the Penney store for delivery to the customer and collection of charges therefor. Penney received a percentage of the money so collected and accounted to appellant for the balance. Penney also made accounting reports to appellant and to its home office.

"We might add that appellant prepared cards notifying its customers of the proposed visit of its photographer. These cards were all stamped and mailed by Penney.

Penney also did a certain amount of newspaper advertising relative to the photographic service.

"When the photographer arrived at the Penney store, he took the pictures, returned the exposed film to the

principal office in North Carolina, where the film was developed, and the picture finished and returned to the Penney store for the delivery to the customer and collection of charges, as above noted. Appellant maintained no office, developing laboratory, or permanent agent in Alabama. The service of exposing the film on the subject child was performed in Alabama through the photographer, with equipment temporarily located in Alabama. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service was performed by Penney employees. We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to appellant for acceptance.

"The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the United States, which empowers Congress to regulate Commerce among the several states. Appellant insists that the taking of the pictures, or exposing the films, was just a link in a chain of events that constituted an interstate transaction, and that it took all the activities enumerated above to constitute engaging in business as a photographer; hence, the license had to apply to all of it, or there would be no activity to which the license would apply. It insists that this activity, consisting of soliciting orders for out of state activity ending in delivery into the State, is a continuous stream or flow of events which meets the definition of interstate commerce.

"Appellee insists that no exemption obtained, and that appellant in exposing the films and taking the pictures of the children was engaged in a taxable event under Section 569, supra, and was subject to the flat tax imposed by said section.

(Emphasis supplied)

IV.

THE QUESTIONS ARE NOT SUBSTANTIAL

We do not doubt that the Appellant is now doing business in some 47 states and in some foreign countries, and its principal place of business is in Charlotte, North Carolina, or that its business is interstate in scope. However, Alabama is in no respect attempting to tax any of the activities of the Appellant taking place in any of said other 46 states or in any foreign county or at its place of business in Charlotte, North Carolina. To the contrary, Alabama is only asking that the Appellant pay the license tax under Section 569, as all other transient photographers do whether they come from within or without this state, for the privilege of their following their profession in Alabama, namely, in conducting sittings in this state and in taking the pictures or exposures with their cameras in this state, which activities take place exclusively in Alabama.

> "The license in both respects is directed against one who pursues the art of photography in Alabama. When a photographer comes into the State, or resides in the State, and moves about in it from place to place, pursuing his profession, he is an itinerant. Skiff v. State, 84 Ala. 454, 4 So. 419, supra. He is then in Alabama rendering some of the essentials of the art of photography as a business, the same as if he had a fixed location here. It is not necessary to perform all the essentials of the art in Alabama to constitute one a photographer subject to license as such in Alabama. The performance of an important feature of it in Alabama is justification for exercising the licensing power. Standard Oil Co. v. City of Selma, 216 Ala. 108, 112 So. 532; Sanford Service Co. v. City of Andalusia, supra. The distinction between such a situation and that of drummers soliciting and procuring sales to be consumated by interstate shipments has been narrowly drawn in express terms, as we have shown. The

principle of the drummers' license cases has not been extended by the United States Supreme Court to a situation where there was locally performed an essential physical act in the performance of a transaction and where the license was directed solely at that local activity, and where it is not laid on interstate transportation nor is an undue burden upon it."

(Emphasis Supplied)

State v. Graves, 258 Ala. 539, 62 So.(2d) 446, at 448 and 449 (1953).

See also to the same effect Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961); and Olan Mills, Inc. of Tennessee v. City of Opelika, et al, 207 F. Supp. 332 (1962).

Standard Dredging Corp. v. State of Alabama, 271 Ala. 22, 122 So.(2d) 280, appeal dismissed 364 U.S. 300, 81 S.Ct. 268.

Dorsey v. Brown, 255 Ala. 238, 51 So.(2d) 360, cert. den. 342 U.S. 818, 72 S.Ct. 34.

Caskey Baking Co. v. Commonwealth of Virginia, 313 U.S. 117, 61 S.Ct. 881 (1941), and cases cited in Footnote 3 as this case appears in 313 U.S. at page 119, and in 61 S.Ct. at page 883.

General Motors Corp. v. Washington, 377 U.S. 436 84 S.Ct. 1564, 1571 (1964).

State of Alaska v. Arctic Maid, 366 U.S. 199, 81 S.Ct. 928 (1961).

Memphis Natural Gas v. Stone, 335 U.S. 80, 86, 87; 68 S.Ct. 1475, 1477, 1478 and cases cited (1948).

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028 (1944).

15 C.J.S. 785, Commerce, Section 111(2), and cases cited in footnotes thereunder.

"The incidence of the tax provides the answer . . ."

Spector Motor Service v. O'Connor, 340 U.S. 602, at 608, 71 S.Ct. 508, at 512 (1951).

Alabama v. King & Boozer, 314 U.S. 1, at 9, 62 S.Ct. 43, at 45 (1941).

United States v. Boyd, 378 U.S. 39, 84 S.Ct. 1518 (1964).

Attention is also called to pages 609 and 610 of the Spector Motor Service opinion as reported in 340 U.S., which clearly recognizes the right of the state to tax local business activities taking place in the state, even though some of the activities connected therewith take place in interstate commerce, where the burden or incidence of the tax is reasonably related to the taxing powers of the state and is nondiscriminatory. Citing International Harvester Company v. Evatt, 329 U.S. 416, 67 S.Ct. 444; Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S.Ct. 1260; Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546; Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, among other cases.

Appellant again under this topic and on page 9 of its Jurisdictional Statement reiterates its contention that the license involved is an entrance fee or permit to enter and do business in this state. Again we say that this is untrue and incorrect. The licenses levied under Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, of which Section 569 is a part, show on their face that they are merely business and occupational license taxes, which are levied on the privilege of one engaging in one or more of such businesses in this state, and that they are applied only to those doing business in this state. They are in no respect police or regulatory laws. They are merely privilege taxes for the doing of business in this state, and do not give anyone a license to commit a specific act. Cosmus v. Lee, 236 Ala. 396, 183 So. 185, 118 A.L.R. 822. Also see United Gas Pipeline Company v. Ideal

Cement Company, et al, 277 Ala. 612, 173 So.(2d) 777, 778, and Sun Flower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510, 511.

In construing the City of Mobile's License Tax Code applying to businesses, etc., engaged in in that city, which Code had similar provisions to those contained in Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, and particularly those contained in Sections 450 and 831, as amended, Title 51, supra, the Supreme Court of Alabama in the case of United Gas Pipeline Company v. Ideal Cement Company, et al, supra, 173 So.(2d) at page 779, characterized such taxes, as follows:

> "The Circuit Court decreed, and this court agrees, that the license fee or tax imposed by said ordinance is for engaging in the business of selling and distributing natural gas in the City of Mobile and its police jurisdiction and does not impose a license tax for entering Mobile to engage in business."
>
> (Emphasis Supplied)

Although included in the same Code section, namely, Section 569 of Title 51, supra, the license tax on photographers and photography galleries operating from fixed locations in this state and the license tax on "transient and traveling photographers," are entirely separate and distinct levies.

Despite what the Appellant would have the court believe, the license tax on transient or traveling photographers is levied upon and applied to all transient photographers who travel from county to county in this state and practice their profession, whether such photographers are Alabama residents, who originate their activities in Alabama, or whether they come from without the state. All transient or traveling photographers for the purpose of the levy of the tax or its application are treated alike. Moreover, there is no evidence in this case whatsoever

that any transient photographer who comes from without the state and goes from county to county in this state conducting sittings and taking pictures with his camera has ever been discriminated against, or that there has ever been any preferential treatment in the case of the transient photographers who come from within this state.

The Supreme Court of Alabama has in this case and also in the Graves and Olan Mills, Inc., cases repeatedly pointed this fact out.

"The license in both respects is directed against one who pursues the art of photography in Alabama. When a photographer comes into the state, or resides in the state, and moves about from place to place, pursuing his profession, he is an itinerant."

(Emphasis Supplied)

Citing Shiff v. State, 84 Ala. 454, 4 So. 419.

State v. Graves, 258 Ala. 539, 62 So.(2d) 446, at pages 448 and 449 (1953).

See also Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388, (1961).

In its arguments on pages 10-13, incl., of its Jurisdictional Statement the Appellant misses the boat entirely. The Supreme Court of Alabama in this case and in the Graves and the Haden cases, supra, has characterized this tax and defined the authoritative meaning of the taxing statute,*2 as being a tax directed against the photographer, and the transient photographer as to

*2 This court has held on several occasions that this is the right and prerogative of the state courts. United Gas Pipeline Company v. Ideal Cement Co., 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677; Alabama v. King & Boozer, 314 U.S. 1, at pages 10 and 11, 62 S.Ct. 43, at page 46; see also Olan Mills, Inc., of Tennessee v. City of Opelika, et al, 207 F. Supp. 832, at pages 834 and 835.

this specific license tax, and the photographer's activities taking place exclusively in this state.

The Appellant repeatedly urges that actually the license tax here involved, although expressly said by the terms of the taxing statute itself to be a license tax on "each transient or traveling photographer," is directed at "solicitations" and sales taking place in interstate commerce.

The Supreme Court of Alabama not only in this case but also in the Graves and Haden cases has clearly and unmistakably construed this taxing statute as being directed at the transient photographer and his activities taking place solely in this state.

> "The license tax here imposed is not laid on the solicitation of orders."
>
> (Emphasis Supplied)
>
> Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at 449.

Contrary to the Appellant's argument, it will be noted that the Alabama Court has construed the statute to the effect that the transient photographer license tax itself is not laid on solicitation of orders, and it can be added that it also is not laid on sales or selling.

For the same result and as to practically the same construction and language see Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388, at page 389.

The Appellant argues that there were no solicitations made by Graves, the photographer, in the Graves case. However, the Graves opinion (62 So.(2d) at page 449) clearly shows, and so states, that Graves, the transient photographer, was an employee of Olan Mills, Inc., of Tennessee and prior to Graves conducting the sittings and taking the pictures, an advanced unit of salesmen (also employees of Olan Mills, Inc.) had solicited and secured contracts for photographs to be made,

and that sometime later and at the appointed time the traveling photographers (a separate and distinct group) would appear and conduct the sittings and take the pictures or exposures. 62 So.(2d) at page 449.

The Appellant tries to draw a distinction between the facts of the Graves case and those involved in the Haden case. There is absolutely no foundation for the Appellant's heretofore unsuccessful attempt to distinguish the facts in the Graves and Haden cases. The activities in the two cases were for all practical purposes the same. Compare the facts as are outlined in Haden (135 So.(2d) at pages 388 and 389) with the facts as are set forth in Graves (62 So.(2d) at page 449).

The reference to the "solicitations" in this case having been made by the Appellant is equally as erroneous. The record shows that the solicitations in this case were actually made by the employees of J. C. Penney, who were employed at the local Penney stores in this state, where the traveling photographer sent out by the Appellant later appeared and conducted the sittings and took the pictures or exposures, as per the appointments made in advance by the local Penney employees.

The record will also show that the President of the Appellant Corporation testified at the trial in the Circuit Court that there was no kind of arrangement whereby the J. C. Penney Company was made, or even considered to be, the agent of the Appellant. That both corporations acted independently in regard to the activities carried on by each. Of course, we realize that whether J. C. Penney Company was the agent of the Appellant in carrying on certain of the activities involved under the facts, would actually constitute a question of law, and one which we do not think it necessary to explore.

The Alabama Supreme Court found (Appellant's Jurisdictional Statement, Appendix, Exhibit A, page 27) that there were no solicitations in Alabama made by the Appellant's employees,

but that the orders for the pictures were actually taken by the local Penney employees.

> "We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to Appellant for acceptance."
>
> (Emphasis Supplied)

The foregoing being considered and for purposes material and relevant to the alleged questions in this case, the facts in Graves and Haden are very similar, if not almost identical.

APPELLANT'S SHIBBOLETHS LISTED AS 1, 2, 3, 4, and 5, and discussed on pages 13 through 22 of its Jurisdictional Statement are replied to, as follows:

1.

WE AGREE WITH THE APPELLANT THAT ALL CASES INVOLVING ALLEGED VIOLATIONS OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, SHOULD BE DECIDED ON THEIR OWN SPECIFIC FACTS. MOREOVER, THIS APPEARS TO HAVE BEEN THE POLICY OF THIS COURT, JUDGING BY THE DECISIONS OF THE PAST AS WELL AS THE PRESENT.

Our agreement, however, ends in this respect, when the Appellant attempts to draw an analogy between the facts of this case and those involved in Nippert v. Richmond, 327 U.S. 416 (1946), Freeman v. Hewit, 329 U.S. 249 (1947), Memphis Steam Laundry v. Stone, 342, U.S. 389 (1954). The breach even becomes wider when the Appellant attempts to apply the doctrines of those cases to the facts in this case.

The City Ordinance involved in Nippert levied a license tax on "Agents - Solicitors - Persons, Firms or Corporations engaged in business as solicitors." 327 U.S. at page 587. In addition it had this very significant provision: "Permit of

Director of Public Safety required before license will be issued . . ." This last provision did give the specific license ordinance involved in Nippert the earmarks of a license under the police and regulatory powers in addition to being a license tax.

There is a very material difference in the levy of the license in Nippert (expressly on "solicitors" and solicitations) and the state license tax statute involved in Graves, Haden, and in this case, the characteristics of which we have already pointed out in some detail. Also, in this respect it is very important to note that neither the State License Tax Statute involved, Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, nor the general provisions relating to the Business and Occupational License Taxes on the State and County level, namely, Section 450 and Section 831, as amended, et seq., Code of Alabama 1940, Recompiled 1958, require in any place or respect that a permit be procured before any of said business, etc. licenses be issued. As stated before, they have been very clearly held to only be license taxes levied on the doing of any of such business, and the privilege of engaging in such business in this state, and not in any respect entrance fees or licenses giving the licensee permission to do a certain thing.

The Appellant could go into quite an amount of detail in distinguishing the facts, as well as the taxing statutes involved in Nippert, Freeman v. Hewit, Memphis Steam Laundry v. Stone, and Railway Express Agency v. Virginia, and other like cases, from the particular facts and the specific statute involved in the case at bar. However, space and the rules will not permit, nor do we deem this to be necessary as this court is very familiar and conversant with all of these cases.

We will point out that the tax in Freeman v. Hewit was a gross receipts tax on sales. (329 U.S. at 250 and 251). The

tax in Memphis Steam Laundry Cleaners v. Stone (342 U.S. at 425), was a license tax on "each person soliciting business for a laundry not licensed in this state (Mississippi) . . . ." The tax in Railway Express Agency v. Commonwealth of Virginia, was also held under the particular facts of that case (347 U.S. at pages 359 and 360) to be a tax laid directly on interstate commerce and invalid as such. Virginia was said to have a constitutional provision forbidding a foreign corporation from exercising any public service powers or functions in that state. The tax involved was said to be a license tax on the gross receipts earned in the state "on business passing through, into or out of this state (Virginia)." Because of such constitutional prohibition, all purely local or interstate business was done by a separate corporation (a domestic corporation and local subsidiary). Thus, it was said that Railway Express was engaged (like Spector Motor Service, 340 U.S. 602), insofar as Virginia was concerned, strictly in interstate commerce, and the license tax involved as so directed in conflict with the commerce clause.

The crux of the decisions in Nippert, Hewit and Memphis Steam Laundry Cleaners, was that the taxing statutes involved imposed taxes whose incidences were laid directly on "solicitations" or sales in interstate commerce, and thus were laid directly on interstate commerce. The license tax involved in Railway Express Agency was held to be invalid as being laid directly on the gross receipts which Railway Express derived from its purely interstate business. These cases differ very materially from the cases where taxes have been upheld by this court as being directed at or laid on events taking place within the taxing state or local activities, which can be reasonably separated from the interstate activities.

Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 61 S.Ct. 881, 882, and cases cited under Footnote No. 3.

Memphis Natural Gas v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 1477, 1478 and cases cited.

Spector Motor Services v. O'Connor, 340 U.S. 602, at page 608, 71 S.Ct. 508, at page 512.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028.

State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 928.

General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 1571; among a number of other cases to the same effect.

The fact that Section 569 of Title 51 of the Alabama Code of 1940, Recompiled 1958, levies only a license tax on the doing of business in this state, or that the License Tax Code of the State of Alabama, of which Section 569 is a part, applies only to such taxes, and in no respect requires fees for the entry of licensees into this state, or a permit before engaging in such businesses, is so apparent from the statutes themselves that we do not believe that any further comment is necessary. We have, however, discussed this particular point in detail already in this brief, as well as having already cited authorities holding that these license taxes are not entrance fees or permits, but are merely taxes on the doing of business in this state, so we will not repeat them here. See Sun Flower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510, at page 511, etc.

2.

THE QUESTION POSED BY THE APPELLANT HAS ALREADY BEEN DETERMINED BY THIS COURT.

Cankey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 61 S.Ct. 881, 882, under Footnote No. 3.

Memphis Natural Gas v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 1477, 1478 and cases cited.

Spector Motor Services v. O'Connor, 340 U.S. 602, at page 608, 71 S.Ct. 508, at page 512.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028.

State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 928.

General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 1571; among a number of other cases to the same effect.

3.

THE LICENSE TAX ON TRANSIENT PHOTOGRAPHERS APPLIES TO ALL SUCH PHOTOGRAPHERS, WHETHER THEY COME FROM WITHIN OR WITHOUT THE STATE OF ALABAMA, AND NO PREFERENTIAL TREATMENT IS SHOWN UNDER THIS LICENSE TAX STATUTE TO THOSE WHO COME FROM WITHIN THE STATE. IT IS APPLIED EQUALLY TO ALL TRANSIENT PHOTOGRAPHERS.

The annual state license tax on photographers following their profession at a fixed location or place of business in this state has nothing whatsoever to do with the license levied by the Legislature on transient or traveling photographers.

The levy on transient or traveling photographers is complete within itself:

"For each transient or traveling photographer, five dollars per week."

The above quoted levy and license tax is entirely separate and distinct from the levy on photographers doing business at a fixed location in this state, as a reading of Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, will clearly show.

The license taxes imposed by Section 569 of one amount on photographers who have a fixed location in this state and a different amount on transient or traveling photographers have been held by the Supreme Court of Alabama to be two separate and distinct levies and the difference in the amount of the two levies not to constitute an inherent discrimination, but to the contrary to be based upon a reasonable classification of photographers. Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at page 448. See also Finley v. State, 37 Ala. App. 555, 72 So.(2d) 135.

This court on numerous occasions has also recognized the rights of the states to set up proper classifications, and even sub-classifications, for the purpose of levying state taxes, and for the purpose of fixing different amounts for such purpose. This court has also upheld such classifications or sub-classifications wherein there is any reasonable grounds or basis to make such differences or separate classifications. See Carmichael v. Southern Coke and Coal Company, 301 U.S. 495, 57 S.Ct. 868, Clark v. Paul E. Gray, Inc., 306 U.S. 583, 594, 59 S.Ct. 744, 750, 751, Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, pages 120 and 121, 61 S.Ct. 881, at page 883.

The Alabama Supreme Court also in the Graves case (62 So.(2d) at pages 448 and 449, and in the Haden case, and in this case, has recognized, and in effect has held, that the license tax on transient or traveling photographers is levied on transient photographers, whether they come from within or without the state.

The state has also always applied this license tax to all photographers who travel from county to county in this state taking pictures, regardless of whether they are Alabama residents, and their activities originate in this state, or whether they come from without the state. There is absolutely no evidence in this case that there has been any discrimination.

4.

WE ARE THE FIRST TO AGREE THAT INTERSTATE COMMERCE CANNOT BE LICENSED BY THE STATES. HOWEVER, THE TAX IN THIS CASE IS NOT DIRECTED AT INTERSTATE COMMERCE, BUT HAS BEEN CLEARLY HELD TO BE DIRECTED AT LOCAL ACTIVITIES TAKING PLACE WITHIN THIS STATE.

The license tax here under facts very similar to the facts involved in this case has been repeatedly held not to be directed at solicitors or sales in interstate commerce, or on interstate commerce itself. To the contrary it has continuously been held to be directed only at local activities taking place within the boundries of this state. Graves v. State, 258 Ala. 359, 62 So.(2d) 446; Haden v. Olan Mills, 273 Ala. 129, 135 So.(2d) 338; Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al, 207 F. Supp. 332 (1962).

5.

THE GREAT MAJORITY OF CASES OF THIS COURT RELEVANT TO THE SUBJECT MATTER WOULD SUSTAIN THIS LICENSE TAX AS HELD TO BE DIRECTED AT LOCAL ACTIVITIES TAKING PLACE WITHIN THE TAXING STATE.

The federal cases cited by the Appellant under its topic No. 5 and on page 20 of its Jurisdictional Statement, namely, the Nippert case, Spector Motor Service, Inc. v. O'Connor, 304 U.S. 602, and Railway Express Agency, Inc. v. Commonwealth

of Virginia, 347 U.S. 359, have all been discussed in detail and clearly distinguished from the case at bar from the standpoint of the law and the facts in at least two instances in this brief, so we believe that that will suffice to show that the facts of those cases are entirely different from the facts of this case, and that the doctrines of those cases are not applicable or relevant to the situation here. The same is also true as to the state court cases which the Appellant has also cited and discussed under its topic No. 5 on pages 20 and 21 of its Jurisdictional Statement. Those cases also all involve different facts or different statutes and taxes which were held to be levied on or directed at solicitations or selling. In fact the Supreme Court of Alabama has in both the Graves case (62 So.(2d), at pages 449 and 450) and in the Haden case (135 So.(2d), at pages 389 and 390), very clearly distinguished those cases from the facts and circumstances here involved.

Actually the case of Commonwealth v. Olan Mills, Inc., 196 Va. 898, 86 S.E.(2d) 27, is the only case cited by the Appellant under its said topic "5," which might be said to have any material identity in fact or similarity in statute.

However, in said Olan Mills, Inc. case there is a very serious difference:

> "McCarter, the individual here charged, was not even a cameraman; he was a solicitor."
> (Emphasis Supplied)
> 86 S.E. at page 29.

This alone seems to make said Olan Mills, Inc. case (86 S.E.(2d) 27), fall within the scope of the other cases cited by the Appellant, which turn on the fact that the taxing statutes involved therein were either held to be directed at "solicitations" or at sales made in interstate commerce.

In said Virginia case the Virginia court construed the Virginia statute ("as it had a right to do") entirely differently

from the way that the Alabama court has repeatedly construed the Alabama statute involved (Title 51, Section 569, supra). That is, the Alabama court has repeatedly held the Alabama License Tax on "traveling and transient photographers" to be directed at the conduct of such photographers in this state in conducting the sittings and taking the pictures, regardless of whether the photographer comes from within the state or from without the state. Cases upholding the license tax as so directed, and considering it to be a tax on local activities, which can be reasonably separated from the interstate activities, in addition to the holding of the Alabama court in this case are:

Graves v. State, 258 Ala. 539, 62 So.(2d) 446 (1953).

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961).

Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al., 207 F. Supp. 332 (1962).

Lucas v. City of Charlotte (4th Cir.) 86 F.(2d) 394, 109 A.L.R. 297.

Craig v. Mills, 203 Miss. 692, 33 So.(2d) 801.

The cases cited by the Virginia court in its decision in Commonwealth v. Olan Mills, Inc. (86 S.E. 27) were the Nippert case (327 U.S. 416), Memphis Steam Laundry Cleaners (342 U.S. 389), and other cases where the taxes involved were said to be laid mainly on "solicitations" or interstate sales.

The Record in this case shows that the orders were procured and solicitations made, not by the employees of the Appellant, Dunbar-Stanley, Inc., but by the local employees of the J. C. Penney Stores located in Alabama. Moreover, the Alabama court in its Opinion in this case (Appendix, Exhibit A, Jurisdictional Statement, page 27) so found:

"We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to Appellant for acceptance."

(Emphasis Supplied)

As indicated by the Record in this case and also in the United States District Court for New Mexico (Exhibit C, Jurisdictional Statement, page 32) Appellant prices its photographs at fifty-nine cents apiece. It is small wonder that Appellant operates in some 47 or 48 states, etc. Appellant does not pay its way. Local transient photographers, as well as other photographers who pay the local taxes, cannot compete.

The facts of this case do not bear out the holding of the United District Court for New Mexico in the Dunbar-Stanley case there involved (see Exhibit C, Jurisdictional Statement, page 32), that said company was engaged exclusively in interstate commerce. The same is also true in regard to the opinion in Commonwealth of Virginia v. Olan Mills, Inc., 196 Va. 898, 86 S.E.(2d) 27. Those cases do not even consider, and entirely ignore, the decisions of this court in Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 120, 61 S.Ct. 881, 882, 883, and the other cases cited and referred to by us under the foregoing topics numbered "2" and "3," where this court has upheld license taxes when directed at local events or activities, which can be reasonably separated from the interstate activities. This would also include the pronouncements of this court even in Spector Motor Service v. O'Connor, 340 U.S. 602, at 608, which expressly exclude from the doctrine of that case taxes directed at local activities.

The facts of this case undisputedly show that local employees of the J. C. Penney stores in this state, handled the advertising, solicited the orders for the photograph, and arranged the sittings, and also collected the money from the customers. Penney deducted fifteen percent in each case for

its fee, and sent the rest to the Appellant. Penney also delivered the photographs when finished to the customers. All of these activities also took place solely within this state. No solicitations were made in this state by employees of the Appellant.

At the appointed time, and in the several Penney stores involved, the Appellant's traveling or transient photographers appeared and conducted the sittings and took the pictures or exposures. Such local activities on the part of the Appellant's photographers is the local event at which the Alabama Court has repeatedly held that the license tax involved is directed, and the thing which it hits.

"While the transportation of the bread over the State line is interstate commerce, that is not the activity which is licensed or taxed. The purely local business of peddling is what the tax hits, and this irrespective of the source of the goods sold. It is settled that such a statute imposes no burden upon interstate commerce which the Constitution interdicts (citing cases in support thereof under footnote "3")."

(Emphasis Supplied)

313 U.S. at 119, 61 S.Ct. at pages 882 and 883.

CONCLUSION

There is no substantial question involved. The question posed by the Appellant has already been settled by this Court. There is no need for further review. The opinion and judgment of the Alabama Court should be affirmed, and this appeal dismissed.

Respectfully submitted,

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